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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-ninth session

SUMMARY RECORD OF THE 594th MEETING

Held at Headquarters, New York,
on Tuesday, 4 June 1996, at 3 p.m.

Chairman: Mrs. PIAGGI de VANOSSI (Argentina)

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ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued)

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The meeting was called to order at 3.10 p.m.

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued) (A/50/17; A/CN.9/421 and 426)

Article 2

1. The CHAIRMAN suggested that the Commission should resume consideration of the proposal to replace the words "generated, stored or communicated" in subparagraph (c) by "communicated or generated prior to storage, if any".

2. Mr. SCHNEIDER (Germany) said that it was necessary to distinguish between three different situations: where a message had been generated, but had not been communicated; where a message had been communicated, but had not been generated; and where a message had been generated and communicated. His delegation felt that the phrase should read "generated and communicated", since otherwise there would be problems. A person who communicated a message could be an agent or employee, in which case he could not be considered the originator. A situation where information had been generated but not communicated was also a situation in which there was no originator.

3. Ms. BOSS (United States of America) said that whether the Commission opted for the words "communicated or generated" or the words "communicated and generated", there would be instances in which the fit was less than perfect. The question of whether a person who communicated a message was the originator could only be answered by determining the purpose for which that information was needed. For the purposes of chapter III, it was appropriate to say that the person who communicated a message was indeed the originator, although in matters of admissibility, it might not be the correct conclusion. Article 2 gave a general definition of "originator" which took on meaning depending on the context. The Guide to Enactment could be very useful in showing how that definition could be used in the context of the rules in chapter II and chapter III. Her delegation felt that if there was a majority in favour of using the connective "or", that would be quite satisfactory.

4. Mr. ALLEN (United Kingdom) said that the case of an agent acting on behalf of an originator was sufficiently covered by the words "or on whose behalf".

5. It was important for the definition of the term "originator" to cover cases in which a draft had been prepared but not actually communicated. It was not necessary to distinguish between drafts and finished documents because each document created was a data message which might or might not be communicated. However, in each case there was an originator: if the document was not communicated, the originator was the person who generated it; if the document was communicated, the originator was the person who communicated it, even if he was not the same person who originally generated it.

6. Mr. VARŠO (Slovakia) said that the originator should be defined as the author of a draft message, who was protected by copyright rules. He agreed that the word "or" should be replaced by "and".

7. Mr. SORIEUL (International Trade Law Branch) said it seemed as though the Commission was near consensus on the substance of the text. He suggested that the text should be sent to the drafting group for clarification of the exact formulation.

8. Mr. SANDOVAL LÓPEZ (Chile) said that his delegation supported that suggestion.

9. Mr. SCHNEIDER (Germany) said that the Commission was considering matters of policy and could not redefine them as drafting matters. His delegation could agree on the substance of the text if an explanation was added in the Guide to Enactment along the lines suggested by the representative of the United States of America.

10. The CHAIRMAN said that subparagraph (c) would be referred to the drafting group.

11. Mr. HOWLAND (United Kingdom) said that it was important to make it clear in subparagraph (d) that the addressee was the ultimate intended recipient.

12. Mr. CHOUKRI (Observer for Morocco) said that the definition of the term "addressee" was not sufficiently clear. If someone received a message, it might be from an intermediary, not the originator. It must be specified that the message was received from the addressee.

13. Ms. BOSS (United States of America) said it was important to retain the word "but" to make it absolutely clear that intermediaries were not considered to be addressees. Her delegation agreed that it was important to consider who the intended addressee, rather than the actual recipient, was. The Commission should retain the original text.

14. Article 2, subparagraph (d), was adopted.

15. Mr. HOWLAND (United Kingdom) said that the word "intermediary" was not used anywhere in the text except in the definitions in article 2, subparagraphs (c) and (d), where it appeared for the purpose of being excluded. Subparagraph (e) as currently drafted defined any agent as an intermediary, and under subparagraphs (c) and (d) they would be excluded from the coverage of the Model Law.

16. Mr. LLOYD (Australia) agreed with the representative of the United Kingdom. The current definition was too broad, and took into account agents who should not be referred to as "intermediaries".

17. Mr. TELARANTA (Finland) expressed support for the position of the United States of America.

18. Ms. BOSS (United States of America) said that the presence of a definition of "intermediary", and its exclusion from the definitions of "originator" and "addressee", were essential in order to ensure that the Model Law would not bind those who were merely providing services with respect to a particular message. The definition currently contained in subparagraph (e) might be very broad,

extending to persons who were not intermediaries in the technical sense, but it was successful in that it did not exclude from the Model Law any persons who should be covered by it. Her delegation therefore felt that it should be retained.

19. Mr. UCHIDA (Japan) agreed with the representative of the United Kingdom that the current definition was too broad.

20. Mr. PHUA (Singapore) supported the United States position. Those who felt that the current definition was too broad should produce a new draft, rather than simply proposing the deletion of the word "intermediary".

21. Mr. FARIDI ARAGHI (Islamic Republic of Iran) favoured retention of the current wording.

22. Mr. MADRID (Spain) said that the definition of "intermediary" should remain unchanged, but that it would be useful to specify in the Guide to Enactment that the word was not being used in the technical sense in which it was generally used in the field of electronic communications.

23. Mr. CHOUKRI (Observer for Morocco) agreed that the definition should remain unchanged.

24. Mr. MASUD (Observer for Pakistan) supported the point made by the representative of the United Kingdom. The current definition of "intermediary" was very broad, and would extend to types of agents which should not be included, such as employees of the originator or of the addressee.

25. Mr. BAUM (Observer for the International Chamber of Commerce) expressed support for the United States position. Considerable efforts to find improved definitions for "intermediary" or alternative terms, such as "third-party service provider", had proved unsuccessful; there was no simple solution, and he urged the Commission to retain the current text.

26. Ms. GUREYEVA (Russian Federation) supported the position of the United States of America.

27. Mr. HOWLAND (United Kingdom), supported by Mr. LLOYD (Australia) and Mr. ANDERSEN (Observer for Denmark), proposed that the current definition of "intermediary" should be replaced with the phrase "a person who, as part of his business, provides to another person services of receiving, transmitting or storing data messages".

28. Mr. SANDOVAL LÓPEZ (Chile) said that the definition should remain unchanged.

29. Mr. MADRID (Spain) strongly supported the representative of Chile. It was inappropriate to propose a drafting change, since it had not been agreed that the existing text should not be retained. Moreover, the relatively narrow definition proposed by the United Kingdom would leave a gap in the law; certain persons, such as employees of originators or of addressees, would fall outside the definitions of "originator", "addressee", and "intermediary".

30. The CHAIRMAN said that there was clearly no consensus in favour of changing the text of subparagraph (e). Accordingly, she invited the Commission to turn its attention to subparagraph (f).

31. Mr. UCHIDA (Japan) proposed that, in the second line of subparagraph (f), the words "information in" should be deleted in order to make the wording consistent with the definition of "data message" in subparagraph (a).

32. Mr. HOWLAND (United Kingdom) proposed that the subparagraph should be amended to read "'Information system' means technology for generating, transmitting, receiving, storing or otherwise processing a data message."

33. Ms. BOSS (United States of America) suggested that the proposal to use the word "technology", rather than "a system", could be left to the drafting group, which would determine whether the change had any implications for the rest of the text. Otherwise, the proposals made by the representatives of Japan and the United Kingdom were acceptable.

The meeting was suspended at 4.30 p.m. and resumed at 5.05 p.m.

34. Mr. MADRID (Spain) endorsed the amendments proposed by the representatives of Japan and the United Kingdom to subparagraph (f), which would now read "'Information system' means a system for generating, transmitting, receiving, storing or otherwise processing data messages." However, he continued to have reservations regarding the repetition of the word "system" in the definition; he hoped that the drafting group would come up with a better alternative.

35. Mr. LLOYD (Australia) supported the amendments proposed by Japan and the United Kingdom but opposed the use of "technology" to replace "system" in the definition. The term "technology" implied the capacity to do something, whereas a "system" suggested something tangible in operation.

36. Mr. ZHANG Yuqing (China) agreed with the representative of Australia that "technology" referred to know-how rather than to equipment. It was more accurate to say that messages were entered into an "information system" than into a "technology". He endorsed the amendments proposed by the United Kingdom and Japan.

37. Mr. CHANDLER (United States of America), supported by Ms. REMSU (Observer for Canada), endorsed the view of the representative of Australia and other speakers who believed that the term "technology" should not be used in the definition of an "information system" in subparagraph (f). "Technological system" or "technological infrastructure" might be possible solutions; however, the drafting group would ultimately be responsible either for finding a formula that all agreed to or for deciding to retain the existing language.

38. Mr. TELL (France) said he believed it would be wrong to repeat the word "system" in the definition in subparagraph (f) and hoped the drafting group would come up with a better solution.

39. The CHAIRMAN said that the consensus was to adopt the Japanese proposal to delete the words "information in" and to add the words "or otherwise processing

data messages" at the end of subparagraph (f), as proposed by the representative of the United Kingdom. Furthermore, most delegations agreed that the term "technology" would not be an appropriate replacement for "system".

40. Article 2, as amended, was adopted.

Article "x"

41. Mr. SORIEUL (International Trade Law Branch) introduced draft article "x", on contracts of carriage involving data messages, which was contained in the annex to document A/CN.9/421. The article in question was not intended to provide answers to all questions that might arise in the area of maritime law and electronic data transmission. Rather, article "x" sought to analyse the functions fulfilled by maritime transport documents which were to be replaced by one or several data messages and to determine the conditions data messages should meet so that they had the same legal validity as paper documents. Paragraph 1 of article "x" provided a description of the functions fulfilled by negotiable and non-negotiable paper documents, and the subsequent paragraphs referred to the legal conditions that must be fulfilled by contracts of carriage.

42. Mr. CHANDLER (United States of America) said that draft article "x" represented an interesting proposal in support of electronic bills of lading and provided rules that could be adapted to various types of bills of lading or contracts of carriage. If the article was adopted, the Model Law would provide assurances that the use of electronic documents would be recognized and permitted.

43. Currently, only a few EDI messages were being used for ocean transport. While existing rules prepared by organizations such as the Comité maritime international (CMI) could provide detailed guidance on the use of electronic messages to create bills of lading, they could not provide a legal basis for such bills since the rules were voluntary. When a country required that a bill of lading should be on paper and bear certain seals, CMI rules could not bypass that requirement, even if the parties agreed to it. All such rules needed legal underpinnings, which the Model Law would provide. His delegation strongly supported adoption of article "x" and believed it should be renamed article "A" and placed at the beginning of a section on particular use rules. He proposed that the Model Law should be divided into two sections, one in which general use rules would appear as articles with numbers, and a second section on particular use rules, which would appear as articles with letters, the first of which would be article "A", i.e. the existing article "x".

44. Mr. HOWLAND (United Kingdom) endorsed the views of the representative of the United States of America and said that his delegation strongly supported the adoption of article "x" and agreed to it being renamed article A. The article in question did much to remove legal impediments in the field of transport contracts by means of electronic communication and was a useful facilitating measure.

45. Mr. MAZZONI (Italy) supported the statements of the United States of America and the United Kingdom.

46. Mr. PHUA (Singapore), noting that the concepts contained in article "x" mirrored many of those contained in the Model Law, asked how article "x" extended the concepts found in the Model Law.

47. Mr. TELL (France) said that the provisions set out in paragraph 1 (f) of article "x" were the most important since they made that article applicable under negotiable terms. It was therefore respect for legal security which would guide the subsequent position of his delegation. He could not endorse the text unless it unambiguously set forth the applicability to that article of the minimum guarantees contained in articles 6 and 7 of the Model Law.

48. In general terms, the proposed text should also provide security guarantees that were comparable to the written ones regarding the authenticity of the title. In that regard, he proposed the addition of a paragraph to article "x" which would read "The provisions of articles 6 and 7 are applicable to the present article or to article 'x'".

49. Mr. MADRID (Spain) said that the concerns raised by the representatives of France and Singapore highlighted the need for the Commission to clarify both the substance and form of article "x". The existence of article "x" should not lead to the erroneous conclusion that the Model Law would not be applicable to that area without that article. It was not necessary to state that article 6 or article 7 was applicable: the Model Law was general in nature and was applied in a general way. Article "x" was a clarification put forward by the Commission. For the purposes of uniformity, the Commission was promoting the opportunity for a uniform application of the Model Law in the specific area of the contract of carriage of goods. His delegation, supported article "x", but agreed with the representative of Singapore on the need for further clarification. Such explanations could be included in the Guide in order to avoid misinterpretations.

50. Concerning the format of the article, while other model laws might have a tradition of using lettered articles, his delegation was not familiar with that practice. The Working Group should find some other formula, or else the secretariat's formula of a general Part I and a specific Part II could be used. In the Working Group, some delegations had been reluctant to consider the question of annexes because they felt that annexes had a subordinate ranking. In his country, the provisions of an annex had the same binding force as provisions appearing in the body of a document.

51. Mr. Won Kyong KIM (Observer for the Republic of Korea) said that in the absence of a specific decision on the position of article "x" no proper deliberations could be held about its contents.

52. Mr. CHANDLER (United States of America) said that the concern of the representative of France could easily be accommodated by inserting the words "subject to the general provisions" at the beginning of article "x", paragraph (1). That would ensure that articles 6, 7 and any others applied to article "x" as a whole. With regard to the Singaporean delegation's concern about duplication of wording, such duplication had occurred in a number of paragraphs because of a particular need in transport documents to explain things fully, thus minimizing the chances of overlooking certain details. He

understood, however, that notwithstanding the duplications, the general provisions always applied.

53. Mr. MASUD (Observer for Pakistan) said that, except for a very general provision that would facilitate the use of EDI wherever it was permitted by individual legal regimes, the Commission would be going beyond its mandate to include things that were intended to override the various legal regimes involved in the carriage of goods.

54. Mr. ZHANG Yuqing (China) agreed with the observer for the Republic of Korea concerning the importance of the position of article "x". The Commission was intending to adopt a model law involving general provisions on EDI which called into question the Model Law's scope of application. Of the articles already discussed, only article 13 was similar to article "x"; otherwise, the entire Model Law dealt with procedural issues. The basic provisions should be applied to specific commercial activities. Article "x", however, dealt with the specific application of the Model Law to contracts of carriage.

55. Since his delegation had every confidence in the future development of EDI, it wondered whether a complete model law thereon could be drafted at present. Various annexes could be attached to the Model Law, such as an annex on the formation of contracts and another on carriage of goods. It could be noted that the Commission had the obligation, in accordance with the development of international trade, to formulate additional annexes. That would make the provisions of the first part complete, and the use of annexes would have the advantage of being open-ended so that adjustments could be made for future developments. The provisions of the annexes should have the same force as the provisions of the Model Law itself.

56. Mr. FALVEY (Observer for the International Association of Ports and Harbors) said that his organization supported the Model Law generally and also article "x". However, he shared some of the Chinese delegation's concerns about potential problems in connection with the implementation of either the Model Law or article "x". Article "x" was merely an example of how the Model Law's provisions could be implemented in respect of a specific set of documents, namely transport documents. Redundant drafting was very prudent, since it protected against fraud and the like and gave assurances to the business community that both the Model Law and its annex would be implemented in a businesslike manner. For those reasons, he supported both the general provisions of the Model Law and article "x". In order to satisfy some of the qualms expressed by some delegations regarding the placement of article "x" within the Model Law, the drafting group might consider including a disclaimer to the effect that nothing contained in article "x" could be deemed to alter, amend, repeal or detract from the general provisions of the Model Law.

The meeting rose at 6.05 p.m.

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-ninth session

SUMMARY RECORD OF THE 595th MEETING

Held at Headquarters, New York,
on Wednesday, 5 June 1996, at 10 a.m.

Chairman: Mrs. PIAGGI de VANOSSI (Argentina)

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ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued)

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The meeting was called to order at 10.20 a.m.

**ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued) (A/50/17; A/CN.9/421)**

Article "x" (continued)

1. Mr. SORIEUL (International Trade Law Branch) recalled that the draft UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication had been designed in modular form, with the first module comprising general rules and the other modules setting forth more specific rules to remove obstacles to the use of EDI in specific areas of trade law. Thus far, the only module containing specific rules was the so-called article "x", which appeared in the annex to the latest report of the Working Group on Electronic Data Interchange (EDI) (A/CN.9/421). Paragraph 60 of that report set forth the Working Group's proposal to divide the Model Law into Part I (general rules) and Part II (specific rules, including article "x"). That proposal had the virtue of maintaining structural coherence and facilitating the addition of further industry-specific provisions in the future.

2. Mr. SANDOVAL LÓPEZ (Chile) said he fully supported the Working Group's proposal. Article "x" should not be placed in an annex to the Model Law because annexes were usually considered to be of secondary importance; consequently, a Government might adopt the main body of the Model Law but not the annex.

3. Mr. CHANDLER (United States of America) said he agreed that article "x" should form part of the main body of the Model Law. He was concerned about the statement made by Pakistan the previous day, to the effect that it could not support the rules in article "x" because they overrode the provisions of various international conventions. The Working Group had taken care not to override any such provisions; article "x" was intended only to fill a vacuum in the laws governing contracts of carriage.

4. Mr. LLOYD (Australia) and Mr. HOWLAND (United Kingdom) said they supported the Working Group's proposal on the placement of article "x".

5. Mr. MASUD (Observer for Pakistan) said paragraphs 2 and 5 of article "x" overrode certain rules of law by changing the way in which they were applied. Moreover, in cases where States parties to conventions requiring that certain information should be presented in writing had enacted domestic legislation to give effect to those provisions, the rules in the Model Law would create complications by requiring those States to change such legislation.

6. Mr. SORIEUL (International Trade Law Branch) said the Model Law, by definition, could not override or conflict with international conventions or national legislation because it was only a proposal to States. Moreover, instruments such as The Hague Rules could not have foreseen the technological developments which had led to the use of EDI; as noted by the United States, the Model Law was intended to fill that vacuum in existing law. Essentially, the Model Law provided new rules on how to interpret, in the light of EDI, the

provisions of conventions and national legislation that required information to be presented in writing.

7. Mr. CHOUKRI (Observer for Morocco) said article "x" was within the purview of the Model Law, since it concerned some of the commercial activities mentioned in article 1 thereof, and should therefore be included in the main body of the Law. However, article "x" was too long; its five paragraphs should be considered five separate articles.

8. Mr. ZHANG Yuqing (China) said his delegation had proposed placing article "x" in an annex to the Model Law so that it would not appear to limit the scope of that Law, which encompassed all international electronic transactions. With the further development of EDI, more annexes could be added. However, he did not object to the secretariat's proposal. In any case, it must be clarified that the Model Law applied to all EDI transactions and not only to specific areas such as maritime transport.

9. Mr. CHANDLER (United States of America) said if anything in the Model Law appeared to interfere with national legislation or to override international conventions, a State could simply decide not to make use of it. The Model Law was intended only to complement national laws in order to facilitate EDI.

10. Mr. MADRID (Spain) said article "x" should be divided into at least two articles, since the first paragraph was very long, and only indicated what matters were covered. The article should be called a "chapter", and each paragraph should be a separate article thereunder. That would make the structure of Part II of the Model Law consistent with that of Part I.

11. Mr. TELL (France) said making article "x" Part II of the draft Model Law was preferable to simply including it as an annex, because the general provisions in articles 6 and 7 of the Model Law would then be equally applicable to it.

12. Mr. FARIDI ARAGHI (Islamic Republic of Iran) said no further additions should be made to the general rules; article "x" should be placed in an annex to the Model Law.

13. Mr. GILL (India), supported by Mr. KOIDE (Japan) and Mr. SCHNEIDER (Germany), said that as article "x" appeared to perform the same function as the "rules" sections of other model laws, it should be included in the Model Law as Part II.

14. Mr. FALVEY (Observer for the International Association of Ports and Harbors) said adoption of article "x" in the form of an annex, as proposed by Morocco and China, appeared to conflict with the provisions of article 1 of the Model Law concerning universality of application of that Law.

15. The CHAIRMAN said there appeared to be a consensus that article "x" should be included in the draft Model Law as Part II, rather than as an annex, in order to avoid raising doubts about its legal value or relevance to the rest of the Model Law.

16. Mr. TALICE (Uruguay) said the structure of article "x" when incorporated into the Model Law, should be consistent with that of the rest of the Law. Dividing chapter II into two sections, the first dealing with contracts of carriage and the second with other topics as necessary, would allow for the possibility of including articles on other subjects.

17. Mr. SANDOVAL LÓPEZ (Chile) said he supported the proposal of the Spanish delegation, bearing in mind that the second part of the Model Law would have to refer to specific provisions. The Uruguayan proposal would have the effect of creating certain functions not paralleled in other articles.

18. Mr. CHANDLER (United States of America) said his delegation supported the Spanish delegation's proposal, and was prepared to accept the advice of the secretariat with regard to the specific form in which article "x" was to be incorporated in the Model Law.

19. Mr. SORIEUL (International Trade Law Branch) said that while paragraph 1 of article "x" could perhaps be treated as a separate article, doing so with each of the other paragraphs of the article would result in creating a section whose form was inconsistent with the rest of the Model Law. He therefore recommended that the drafting group should be instructed to study the incorporation of article "x" in two segments, with the first comprising the current paragraph 1 outlining the scope of application, and the second comprising the rest of the article.

20. Mr. CHANDLER (United States of America), supported by Mr. HOWLAND (United Kingdom) and Mr. CHOUKRI (Observer for Morocco), suggested adding the words "or statement" after "notice" in paragraph 1, subparagraph (d), and deleting the words "irrevocably or not" in subparagraph (e).

21. The CHAIRMAN said there appeared to be a consensus in favour of the United States proposal regarding subparagraphs (d) and (e).

The meeting was suspended at 11.30 a.m. and resumed at noon.

22. Mr. HOWLAND (United Kingdom) noted the word "requires" at the beginning of article "x", paragraph 2, could be taken to mean either an obligation or a condition for being valid and enforceable. As the Working Group had realized, the phrase "or provides for certain consequences if it is not ..." could be interpreted to mean the opposite of what was intended. He therefore proposed that that phrase should be deleted and the following sentence added at the end of the paragraph: "This paragraph applies whether the requirement imposes an obligation or whether it is a condition of the validity, effectiveness or enforceability of the action."

23. Mr. ANDERSEN (Observer for Denmark) expressed his concern that article "x" should be consistent with the text of the entire Model Law. The phrase which the United Kingdom representative had proposed for deletion appeared in article 5 and elsewhere. Thus, it might be appropriate to add the sentence just proposed to article 5 as well. He requested clarification from the secretariat.

24. Mr. SORIEUL (International Trade Law Branch) said article "x" had been drafted taking into account other provisions of the Model Law. Upon closer consideration, the Working Group had realized that the phrase "or provides for certain consequences if it is not ...", taken from article 5 was not really sufficient. If consequences ensued when an action was not in writing, it was not logical to say that the rule of law was satisfied by using a data message. In fact, the Commission agreed on the principle that a data message could replace something in writing in all cases but must now verify whether the phrase "or provides for certain consequences if it is not" was effective in article "x". If it determined that an alternative, such as the United Kingdom proposal, was necessary, the rest of the Model Law would have to be reviewed for consistency.

25. Mr. CHANDLER (United States of America) said he agreed that paragraph 2 - and probably a number of general provisions of the Model Law - contained huge flaws in logic. It made no sense to say that a rule of law was "satisfied"; at best a condition or requirement was satisfied. He agreed with the United Kingdom representative that the phrase "or provides for certain consequences if it is not ..." should be deleted. However, the sentence which the United Kingdom proposed should be added at the end of the paragraph might not solve the problem. It would be much simpler to amend the paragraph by deleting the word "requires" after "Where a rule of law" and replacing it by the words "either by requirement or by consequences, makes it a condition that any action ...". At the end of the paragraph, "rule " would be replaced by "condition".

26. Mr. LLOYD (Australia) said he agreed that there was a problem with the drafting of paragraph 2 and perhaps with articles 5, 6 and 7 of the Model Law as well. He had a slight preference for the United Kingdom proposal over the proposal just made by the United States. If the Commission could agree on a solution in principle, the wording could be left to the drafting group.

27. Mr. HOWLAND (United Kingdom) acknowledged that the amendment he had proposed might necessitate parallel changes in other provisions of the Model Law. If changes had to be made in a number of places, perhaps economy of language could be achieved by adding a paragraph to the definitions in article 2.

28. Mr. ANDERSEN (Observer for Denmark) said he was satisfied by the secretariat's explanation. Perhaps it was not necessary to state explicitly conditions and the consequences, as the United States had proposed, since they could be easily inferred from the fundamental principles of the application of law. The United Kingdom proposal was very much in line with the tenor of the Model Law and could be incorporated into articles 5 and 6 as well. If explanations were necessary, they could be included in the Guide to Enactment.

29. Mr. MADRID (Spain) said he agreed that more appropriate language was necessary in paragraph 2. As long as the Commission agreed on the substantive issue, either of the two proposals was acceptable. The wording of the paragraph could be left to the drafting group.

30. Ms. EKEMEZIE (Nigeria) said she agreed that paragraph 2 was flawed and should be referred to the drafting group.

31. Ms. REMSU (Observer for Canada) said she, too, recognized that there was a flaw in logic in paragraph 2, which could be dealt with by the drafting group. The United States proposal was preferable to the United Kingdom proposal.

32. The CHAIRMAN confirmed that paragraph 2 would be submitted to the drafting group for clarification.

33. Mr. HOWLAND (United Kingdom) said the aim of paragraph 3 of article "x" was to avoid any danger of duplication in the transfer of rights and obligations by two different means, so that in a series of transactions relying on data messages where a subsequent party made use of a paper document there must be a demonstrable assurance that the prior method of data message transmission was cancelled. In fact, paragraph 4 of the article provided the essential guarantee of singularity, so that his delegation would prefer to see the substance of existing paragraph 3 follow on from that of paragraph 4.

34. Mr. CHANDLER (United States of America) said his delegation would not object to moving paragraph 3, which, he proposed, should be amended by the insertion of a new second sentence, reading: "Any paper document issued shall contain a statement of such termination."

35. Mr. HOWLAND (United Kingdom) supported that amendment.

36. Mr. LLOYD (Australia) said his delegation had no objection to the United States amendment. There were, however, two difficulties with paragraph 3. The reference to "such actions" in the first sentence was illogical, since the actions had already been effected by data message, and the sentence must really mean actions of the type referred to in paragraph 1, subparagraphs (f) and (g), and not the actual actions already effected by data message. Similarly, the use of the word "substitution" in the second sentence really meant that following termination, paper must be used; there was no question of substitution of what had already been done. The current wording gave an unintended impression.

37. Mr. MADRID (Spain) said his delegation supported moving existing paragraph 3. As currently worded, that paragraph only partially addressed any doubts that might arise for third parties in connection with the use of paper documents as to whether there had previously been a data message. The United States proposal would provide added certainty. He would welcome clarification, however, as to whether that amendment would mean that in every case a statement would be required indicating that there was no parallel data message, or if the procedure it outlined, would be employed only where electronic means had previously been used, in which case in the absence of any statement the situation would not be clear to third parties, since the statement could simply have been omitted.

38. Mr. CHANDLER (United States of America) said such doubts existed in many areas. There was, for example, no way to guarantee that a carrier issued only one bill of lading; even if a bill of lading indicated that no electronic data interchange method was involved, that might not be the case. Such an instance would, of course, constitute fraud, which would give rise to liability. All that the Commission could do was to provide that where parties had a choice of opting out of the electronic system they would be warned that there might have

been a previous electronic transaction. There was no universal way to address the problem, and the Commission should take care not to restrict the system unnecessarily, but should merely ensure that where electronic use was terminated, subsequent documentation indicated that fact.

39. The CHAIRMAN suggested that interested delegations might wish to formulate a revised draft of the paragraph.

40. Mr. HOWLAND (United Kingdom) said that, on the assumption that paragraph 4 would refer to the necessity of reliable assurance, his delegation proposed that paragraph 3 could be reformulated to provide that an assurance should not be sufficient for the purpose of paragraph 4 unless it included reliable assurance that if the right or obligation had been conveyed by a person by means of a paper document it could not also be conveyed by the same person by means of a data message subsequently or concurrently, and unless the method used to give such assurance was specified to the person to whom the right or obligation was to be conveyed. Such a formulation would reflect the essence of paragraph 3 and the concern that a recipient must be given clear notice where data messaging had been cancelled.

41. Mr. TELL (France) said the United Kingdom proposal still left unresolved the question of when any change from one means to the other was to take place. The Commission might consider whether a party should be prohibited from making a change from electronic means to the use of paper documents. He inquired what the rationale was for the emphasis in the United Kingdom proposal on one means or the other.

42. Mr. HOWLAND (United Kingdom) said the fundamental security being sought was a guarantee of singularity, so that rights and obligations could be transferred to one person only and not to a multiplicity either initially or subsequently, which would constitute fraud. Accordingly, electronic messaging must be used in such a way as to prevent duplication. In particular, where a party required a paper document in a series of transactions that had begun with a data message there must be an assurance that there was no duplication and that data messages would not continue to be used as well. The Working Group had felt that the need for security was so important that it should be set out in a paragraph of its own, since commercial operators using electronic data messages and paper needed a clear assurance that no duplication was possible regarding the transfer of rights and obligations.

43. The CHAIRMAN said there appeared to be no objection to moving paragraph 3 to follow paragraph 4.

The meeting rose at 1.05 p.m.

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-ninth session

SUMMARY RECORD OF THE 596th MEETING

Held at Headquarters, New York,
on Wednesday, 5 June 1996, at 3 p.m.

Chairman: Mrs. PIAGGI de VANOSSI (Argentina)

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ELECTION OF OFFICERS (continued)

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued)

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Corrections should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent within one week of the date of this document to the Chief, Official Records Editing Section, Office of Conference and Support Services, room DC2-794, 2 United Nations Plaza.

Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

96-80754 (E)

The meeting was called to order at 3.20 p.m.

ELECTION OF OFFICERS (continued)

1. The CHAIRMAN invited the Commission to elect three Vice-Chairmen.

2. Mr. GOH (Singapore) nominated Mr. Piyavaj Niyom-Rerks (Thailand).

3. Mr. AUSTEN (Poland) nominated Mr. Varšo (Slovakia).

4. Mr. Piyavaj Niyom-Rerks (Thailand) and Mr. Varšo (Slovakia) were elected Vice-Chairmen by acclamation.

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued) (A/50/17; A/CN.9/421 and 426)

Article "x" (continued)

5. The CHAIRMAN invited the Commission to resume its consideration of draft article "x", contained in the annex to document A/CN.9/421.

6. Mr. MADRID (Spain) said that the wording of paragraph 4 did not seem to provide for situations in which a right was to be acquired by a group of persons pro indiviso.

7. Mr. LLOYD (Australia) suggested that the drafting group should consider whether the words "that rule is satisfied" in the third line of paragraph 4 should be replaced by the phrase "that requirement is met", and whether in paragraph 2, the word "condition" should be avoided because of its very specific meaning in the contract law of several countries.

8. Mr. MASUD (Observer for Pakistan) suggested that the words "is to be granted to" should be deleted from the first line of paragraph 4 and that the words "the requirement of" should be added before the words "that rule".

9. Mr. MAZZONI (Italy) proposed that, after the words "one or more data message", the remainder of paragraph 4 should be amended to read "provided that the method used to effect such conveyance is reliable enough as to designate as beneficiary of such conveyance the intended person only and no other person".

10. Mr. DONG Yi (China) wondered whether the use of the words "by any means which includes the use of one or more data message" meant that the paragraph was intended to be applicable to means other than data messages.

11. Mr. SORIEUL (International Trade Law Branch) recalled that article "x" was intended to be applied only to contracts involving data messages; perhaps the drafting of paragraph 4 could be made more clear in that respect.

12. Mr. CHANDLER (United States of America) agreed that it was a drafting problem. The beginning of the paragraph should refer to "any right or obligation pursuant to a contract of carriage of goods".

/...

13. Mr. MADRID (Spain) said that the wording proposed by the representative of Italy was a significant improvement; however, the question of reliability should be borne in mind with respect to the identification of the right of obligation to be acquired, as well as the addressee. As to the expression "by any means" in the third line, it should be made clear whether the reference was to legal or technical means.

14. Mr. HOWLAND (United Kingdom) said that it should be specified that the rights and obligations referred to were those listed in paragraphs 1 (f) and 1 (g). As to the issue of reliability raised by the representative of Spain, the Commission might feel that it was adequately addressed in paragraph 5.

15. Mr. MADRID (Spain) said that it would be wrong to restrict the application of paragraph 4 to the rights and obligations listed in paragraphs 1 (f) and (g), since paragraph 4 was designed to apply to the entire article.

16. Mr. SORIEUL (International Trade Law Branch) agreed with the representative of Spain that the scope of the article should be clarified. However, as he understood it, the United Kingdom proposal had been intended not to restrict that scope, but to avoid the danger of an excessively broad interpretation.

17. Mr. MAZZONI (Italy) suggested that paragraph 5 should begin with a broader formulation, such as "For the purposes of paragraph 3", since the rule might come into play even if nobody raised a question, and guidance needed to be provided.

18. Mr. LLOYD (Australia) supported the proposal by the representative of Italy. The reference should be to paragraph 4.

19. Mr. HOWLAND (United Kingdom) and Mr. CHANDLER (United States of America) said that they, too, supported the proposal.

20. Paragraph 5, as amended, was adopted.

21. Mr. CHANDLER (United States of America) said that excess verbiage should be cut from paragraph 6. The word "rendered" should be deleted.

22. Mr. HOWLAND (United Kingdom) said he could agree to that deletion but would prefer to leave the rest of the paragraph unchanged.

23. Mr. MADRID (Spain) said that the paragraph could be simplified even further and must not imply any discrimination between paper documents and data messages.

24. Mr. CHANDLER (United States of America) said that problems arose because the definition of a bill of lading varied from country to country. In some cases a country might not consider an electronic data message to be a bill of lading. Paragraphs 2 and 6 therefore dealt with entirely different concepts.

25. Mr. HOWLAND (United Kingdom) said that the issue had been considered by the Working Group in considerable depth, and it had been decided that the best approach was a minimalist, permissive approach, which was embodied in paragraph 6. The paragraph left open the possibility of being selective

according to the customs, practices and rules applicable in different countries. Therefore, for the very reasons put forward by the United States representative, his delegation would prefer to keep paragraph 6 unchanged.

26. Mr. RENGER (Germany) said that the drastic changes sought by the United States representative went further than the Working Group had been able to go. He would prefer to retain the current wording of paragraph 6, with the possible deletion of the word "rendered".

27. Mr. LLOYD (Australia) said that in paragraph 6 as currently drafted there was insufficient connection between paper contracts and data message contracts. A formulation was needed which would connect the two types of contracts.

28. Mr. TELL (France) said that the existing text should be retained as a compromise solution reached in the Working Group.

The meeting was suspended at 4.35 p.m. and resumed at 5.15 p.m.

29. Ms. REMSU (Observer for Canada) agreed to the deletion of the word "rendered" in paragraph 6. The Australian delegation's concern about linking the contract of carriage in the first line with the rest of the paragraph could be accommodated by the insertion of the word "such" before the words "a contract of carriage" in the second and third lines.

30. Mr. ILLESCAS (Spain) said that he favoured the wording "the rules shall be applicable" because it was more explicit. The current wording of paragraph 6 was ambiguous. His delegation was concerned about ensuring that rules of national origin which were compulsory when the carriage, bill of lading and the contract were on paper should be equally compulsory when the contract, carriage and bill of lading were sent by data message.

31. Mr. RENGER (Germany) disagreed with the change suggested by the representative of Spain. In his view, the current wording of paragraph 6 accommodated all the reservations raised by delegations, and the compromise reached by the Working Group should not be called into question.

32. Mr. HOWLAND (United Kingdom) said that, except for the deletion of the word "rendered", his delegation was satisfied with the current wording of the text. However, the addition of the words "of a certain kind" after the words "a paper document" in the second line of paragraph 6 might help some of the other delegations to accept the text.

33. Mr. LLOYD (Australia) suggested the insertion of the word "such" after the words "inapplicable to" in the second line of paragraph 6, without which the clause ran the risk of applying laws which were inappropriate for a contract.

34. Mr. HOWLAND (United Kingdom), supported by Mr. ADENSAMER (Austria), Mr. MAZZONI (Italy) and Mr. MADRID (Spain), endorsed the suggestion of the Australian delegation.

35. Paragraph 6, as amended, was adopted.

36. Paragraph 7 was adopted.

Title of the draft Model Law

37. Mr. HOWLAND (United Kingdom) noted that some delegations felt that the title of the Model Law was too long. Accordingly, he suggested the deletion of the words "legal aspects of".

38. Ms. BOSS (United States of America) said her delegation had concluded from its discussions with parties that would ultimately be dealing with the provisions of the Model Law that they did not understand that the Model Law was relevant to individuals engaging in forms of electronic commerce other than EDI, and that the title was too long. The term "electronic commerce", however, had been receiving increasing acceptance in the international community, and might be used in the title. To retain a long title which hinged on what was now only a minor part of the technological revolution would do a disservice to what would otherwise be quite an influential product.

39. Mr. CHOUKRI (Observer for Morocco) suggested that the title should read "Draft Model Law on EDI".

40. Mr. PHUA (Singapore) said that, since the Model Law dealt with commercial transactions conducted through electronic means, he endorsed the proposal to amend the title to "Draft Model Law on Electronic Commerce", in keeping with the suggestion by the representative of the United States of America.

41. Mr. LLOYD (Australia) endorsed that proposal and agreed that the term "electronic commerce" was becoming more and more widely used by people in the industry.

42. Mr. TELL (France) agreed that a shorter, more explicit title was needed for the draft Model Law and endorsed the United States proposal.

43. Mr. RENGER (Germany) agreed that the title of the Model Law should be shorter, but believed that the term "electronic commerce" would limit its scope of application since the Model Law did not apply solely to commercial transactions. His delegation would prefer a title such as "Model Law on EDI".

44. Mr. MAZZONI (Italy) favoured the title "Model Law on Electronic Commercial Transactions", which was clearer and translated easily into his language.

45. Mr. SANDOVAL LÓPEZ (Chile) endorsed the United States proposal.

46. Mr. ZHANG Yuqing (China) endorsed the title "Model Law on Electronic Commerce", adding that if that title was adopted, a definition of "electronic commerce" should be included in the text of the Model Law.

47. With regard to article "x", he favoured placing it in an annex to the Model Law. Furthermore, he hoped that the final draft of the Model Law would make clear that the scope of application was broad and included new technologies.

48. Mr. ANDERSEN (Observer for Denmark) endorsed the United States proposal. There was every indication that the term "electronic commerce" would be even more widely used in future years, a situation which made it more attractive in terms of marketing the Model Law.

49. Mr. Won-Kyong KIM (Observer for the Republic of Korea) endorsed the proposal of the United States of America. In reply to the representative of China, who had expressed concern that the Model Law contained no definition of the term "electronic commerce", he recalled that article 1 stated that the Model Law applied to data messages "used in the context of commercial activities". By using the term "electronic commerce" in the title of the Model Law, the Commission would play a leading role in defining terminology in the field of electronic data interchange.

50. Mr. MASUD (Observer for Pakistan) suggested that, since the Model Law dealt primarily with commercial transactions by means of electronic, optical and other related means, the title might be changed to "Model Law on Commerce through Electronic and Related Means", which had a broader scope than "electronic commerce".

51. Mr. MADRID (Spain) strongly supported the proposal of the representative of the United States of America.

52. Ms. REMSU (Canada) agreed that the shorter title "Model Law on Electronic Commerce" was more appropriate, especially since the term "electronic commerce" was gaining rapid acceptance, even in government circles. She therefore endorsed the proposal of the United States of America.

53. Mr. UCHIDA (Japan) sought clarification as to whether the term "electronic commerce" included telegram, telex and telecopy, the means of transmission covered under the Model Law.

54. Mr. ALLEN (United Kingdom) said that while he agreed a shorter title which contained the word "electronic" was needed for the Model Law, the term "electronic commerce" could be misleading because it implied that the Model Law was about the underlying commercial transaction, rather than the procedures governing communication. The Model Law contained provisions on the admissibility and retention of data messages and dealt with requirements of national legislation, regardless of whether the communication related to commercial activities. As a compromise, he proposed the title "Model Law on Electronic Communication", which emphasized that the Model Law dealt with the procedures for governing communications.

55. Mr. CHANDLER (United States of America) said that using the term "electronic communication" would be inappropriate and would cause confusion with international telecommunications. For that reason, his delegation opposed the United Kingdom proposal. In reply to the representative of Japan, he said that the term "electronic commerce" included EDI, electronic mail and all areas of electronic transmission including telex, telegram and fax. He agreed with the observer for the Republic of Korea that the Commission was breaking new ground with the Model Law and that it should therefore not hesitate to establish new terms where warranted. The term "electronic commerce" was being used in an

increasing number of areas precisely because it was less restrictive than the term "EDI".

56. Mr. CHOUKRI (Observer for Morocco) said that he was opposed to the title "Model Law on Electronic Commerce" because his delegation believed it would lead to confusion. He proposed the longer but clearer title "Draft Model Law on Commercial Transactions in the Electronic Field".

57. The CHAIRMAN said that there seemed to be a consensus that the Commission should adopt the title "Draft Model Law on Electronic Commerce" proposed by the representative of the United States of America.

58. The title of the draft Model Law, as amended, was adopted.

The meeting rose at 6.05 p.m.

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-ninth session

SUMMARY RECORD OF THE 597th MEETING

Held at Headquarters, New York,
on Thursday, 6 June 1996, at 10 a.m.

Chairman: Mrs. PIAGGI de VANOSSI (Argentina)

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ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued)

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96-80760 (E)

The meeting was called to order at 10.20 a.m.

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued)

Article 1

1. Mr. SORIEUL (International Trade Law Branch) said the drafting group would need to review the draft Model Law to ensure consistency. A number of substantive issues also remained. With respect to article 1, at the previous session the drafting group had concluded that the second of the two formulations in square brackets appearing in the third footnote to the article was preferable. If the Commission approved that view, a list could then be prepared indicating the kind of message that would be excluded from the scope of the Model Law. That approach would conform to article 5, paragraph 2, article 6, paragraph 2, and article 7, paragraph 3, of the Model Law, where a list of exclusions would also be required.

2. Ms. BOSS (United States of America) said her delegation would support adoption of the second alternative listed in the third footnote, since that had been the consensus in the drafting group.

3. Mr. ALLEN (United Kingdom) said the first alternative, specifying all the situations to be covered by the Model Law, would in practice present serious difficulties, and might well make the Model Law more restrictive than intended; his delegation therefore supported adoption of the second alternative.

4. Mr. MADRID (Spain) agreed that the second formulation was preferable - particularly since the intent was to allow States to extend the applicability of the Law - and would accord better with later articles. Use of the first alternative would in fact, be likely to restrict the scope of the Model Law.

5. Mr. MAZZONI (Italy) and Ms. REMSU (Observer for Canada) supported adoption of the second formulation.

6. The CHAIRMAN said there appeared to be a consensus in favour of the second formulation in the third footnote to article 1.

7. Mr. SORIEUL (International Trade Law Branch) said the second issue left pending by the drafting group was whether there was a need to include a rule of interpretation concerning the intent of the parties. The question arose, for example, as to whether contracts concluded in writing prior to the entry into force of the Model Law would be affected by its provisions, and whether the functional equivalent of "writing" provided for under the Model Law would prevail or whether the original contract would subsist.

8. Mr. ABASCAL (Mexico) said the phrase "rule of law" was used in connection with the Model Law to cover laws enacted under the various legal systems in question. However, the UNCITRAL Model Law on International Commercial Arbitration embodied a different approach, in that it allowed parties to instruct arbitrators which rules of law were applicable for the settlement of a dispute. In that context, "rules of law" had been taken to include precepts not

emanating from national legislation, such as the UNIDROIT rules governing international contracts. In view of the different approaches, the Commission should seek other language so as to avoid erroneous interpretations.

9. Ms. BOSS (United States of America) said the question as to whether a rule of interpretation was needed to determine the meaning of an agreement entered into prior to the adoption of the Model Law affected only a small number of cases. Furthermore, the Model Law, in chapter III, allowed variation by agreement in many cases. The real issue was to determine the will or intent of the parties as expressed in the agreement. In the United States the answer to that question would depend on the agreement as a whole, on statutory interpretation and on the circumstances. Where, for example, an agreement required a notice in writing, but that requirement merely mimicked a statutory writing requirement, thus bringing the statutory requirement into the agreement, it could be argued that the Model Law's interpretation of that statute would similarly be brought into the agreement, since it had been the intent of the parties to incorporate what existed under statutory law. Where, however, there was no outside reference to statutory law, as in the case of a company controlling its employees by requiring that any acts of the company should be represented in a writing approved by the company's home office and signed by given individuals, it was more likely than not that the parties intended a paper document signed by the appropriate officials. It was thus not appropriate to have an interpretational provision in the Model Law that applied across the board; the matter should be governed by the domestic law dealing with the interpretation of agreements between parties.

10. Mr. MASUD (Observer for Pakistan) said the question of a rule of interpretation did not apply solely to agreements entered into prior to the adoption of the Model Law; it had a broader application. Where it was clear that the intent of the parties had been to have something in writing the Model Law should not impose electronic means as a substitute for such written documents. The whole purpose of the Model Law was to facilitate the use of electronic means, not to impose them.

11. Mr. SANDOVAL LÓPEZ (Chile) said there was no need for a rule of interpretation, since the general principle governing contracts was that they should take into account relevant legislation in force at the time the contract was concluded.

12. Mr. TELL (France) questioned the relevance of a rule of interpretation in what was, after all, a model law, and thus not to be imposed on parties to agreements.

13. Mr. MADRID (Spain) said there was a fundamental problem in that chapter III of the Model Law expressly provided that parties might vary its provisions, whereas the intent in chapters I and II was the contrary, namely that there was to be no variation. That point might be elucidated in the Guide to Enactment. Notwithstanding the provisions of chapter II, if the parties wished a document to be in writing, that wish should prevail since it was the fundamental will of the parties in question. Where there was no question of the fundamental will of the parties, the situation was different, and a functional equivalent under the Model Law would be valid. As noted earlier, the aim of the Model Law was to

facilitate electronic data interchanges in commercial transactions, but not to impose them.

14. Mr. ALLEN (United Kingdom) agreed that there should be no rule of interpretation along the lines suggested. Parties could always extend the meaning of the word "writing", and if they had a requirement for writing the chances were that they meant writing in the traditional sense.

15. Mr. ABASCAL (Mexico) agreed there was no need for a special rule of interpretation. Perhaps a section on interpretation should be in the Guide, as that concern was not dealt with in the Model Law itself (A/50/17, para. 236).

16. Ms. BOSS (United States of America) noted there was an emerging consensus in the Commission that no specific provision on interpretation was necessary. She agreed with the suggestion that the issue should be covered in the Guide. It might not be judicious to state categorically in the Guide that the rules were mandatory. The Commission had yet to consider article 10, paragraph 2, whose wording had been specifically agreed upon, whereby the provisions of chapter II could be varied if permitted by domestic law.

17. Mr. ANDERSEN (Observer for Denmark) supported the proposal to discuss interpretation in the Guide. He wondered whether it would be appropriate to include the third footnote to article 1 in the Guide as well.

18. Mr. SORIEUL (International Trade Law Branch), replying to the Mexican representative, said that, although the Working Group had reopened the debate on article 10, paragraph 2, when it considered article "x", for purposes of the Commission, that debate was closed. The term "rule of law" was used differently in article 28 of the UNCITRAL Model Law on International Commercial Arbitration and in the draft Model Law on EDI. In the latter Model Law, the term covered, inter alia, mandatory rules, laws and decrees and case law but not contractual law, including the Uniform Customs and Practice of the International Chamber of Commerce.

19. Mr. ABASCAL (Mexico) said although the debates held the year before were not to be reopened, the Commission's report (A/50/17) did not actually contain final decisions. The Working Group had never informed the Commission of the problem of interpretation in two different contexts and no discussion had been held. In the UNCITRAL Arbitration Model Law "rule of law" meant the selection of laws from a specific legal system, whereas in the Model Law on EDI, it did not. The easiest solution would be to find another term.

20. Mr. SORIEUL (International Trade Law Branch) asked the Mexican representative if he was proposing that the words "where the rule of law ..." in article 5, paragraph 1, should be replaced by "where law ...".

21. Mr. ABASCAL (Mexico) said he felt "rule of law" should not be used but was not necessarily proposing a specific replacement text.

22. Mr. LLOYD (Australia) said his delegation was pleased that the prevailing view was that no special provision was needed on contractual agreements made prior to the adoption of the Model Law. A transitional clause allowing

countries to adapt the Model Law to their own legal systems might be more useful than an explanation in the Guide. He acknowledged that the term "rule of law" had a broader application but would not comment at the current stage on the Mexican representative's remarks.

23. Mr. CHANDLER (United States of America) expressed shock at the restrictive interpretation of the term "rule of law" contained in the Commission's report. The consequences provided for in the Model Law flowed from the law but also very definitely from customs and practice. Indeed, the Commission's work would not be very valuable if customs and practice were not taken into account, particularly in the field of electronic data interchange. Article "x", paragraph 2, should be redrafted accordingly.

24. Mr. MAZZONNI (Italy) agreed that international trade law was much broader than "rules of law" and embraced customs and practice as well. Consistency in the Model Law was also of paramount importance.

25. Mr. SORIEUL (International Trade Law Branch) reiterated that the Commission had to decide on a question of terminology or form, and one of substance, namely whether to include customs and practice within the scope of articles 5, 6 and 7.

26. Mr. ALLEN (United Kingdom) said there were three ways in which customs and practice were relevant to law: (1) when they were incorporated into a contract, either expressly or implicitly, including by common law; (2) when rules were developed through customs and practice and then became rules of law by incorporation; and (3) when customs and practice were referred to in interpreting how a statutory rule of law was to be applied. Customs and practice did not have to be specifically mentioned in any of those cases. Chapter II was concerned, not with the contractual relationship of the parties, but solely with rules of statutory law and case law. Even where a statute was developed through customs and practice so that they effectively became a rule of law, chapter II would automatically apply. The Commission should not interfere with the application of rules derived from customs and practice. The term "rule of law" should be clarified in the Model Law - perhaps in the definition portion - as not everyone would read the lengthy draft Guide.

27. Mr. MADRID (Spain) agreed wholeheartedly with the representative of the secretariat that two different questions must be resolved, one of form and the other of substance. Concerning the question of form, it would be important to ensure that whatever term was used did not have different meanings within the draft Model Law and that if it were replaced, the new term was truly appropriate in every context. Concerning the question of substance, Commission members should indicate whether they preferred a broad or narrow interpretation of the term "rule of law". The Commission should explain its choice in the draft Guide, bearing in mind that its interpretation might be much narrower than it was in many countries which incorporated customs and practice into their definition of rule of law.

28. Ms. BAZAROVA (Russian Federation) suggested that if the words "rule of law" were removed from article 5, paragraph 1, the paragraph could be revised to indicate that if an agreement called for information to be presented in writing,

that presentation in writing could be replaced by the same information in the form of a data message.

29. Mr. TELL (France) said the Commission had excluded contractual stipulations and trade usages or practice from the scope of application of articles 5, 6 and 7 of the Model Law. The reference to "rule of law" could not be easily transposed to the context of electronic data interchange. His delegation opposed the inclusion of international commercial practices or rules of the International Chamber of Commerce in the scope of "rule of law".

30. Mr. MAZZONI (Italy) said in international trade law, the term "rule of law" had acquired a meaning which encompassed rules other than those included in decrees of national legislation or acts of parliament. The emphasis on the international origin of the Model Law in article 3 of the draft had been intended to forestall the tendency to interpret expressions on the basis of national legal concepts. Unless the term was to be interpreted in a broad sense in the context of the Model Law, it would therefore have to be replaced because of the technical meaning it had already acquired.

31. Mr. ABASCAL (Mexico) associated himself with the position of the Italian delegation that the term "rule of law" should be interpreted broadly in the Model Law. For example, the provisions of the International Institute for the Unification of Private Law (UNIDROIT) were not customs and practice, but rules of law existing in the international community that were part of international trade law. The matter should not be left for explanation in the Guide; if the term were to be interpreted in the narrow sense, then it should be changed and an appropriate explanation of the change included in the Commission's report.

32. Ms. BOSS (United States of America) said the apparent disagreement over interpretation of the term "rule of law" stemmed from differences in legal systems and their approaches to dispute resolution. Her delegation agreed with that of France, in that customs and practice, in so far as they were recognized, were part of the rule of law. That was not to say that customs and practice should necessarily be seen as partial sources of law, but the inability of positive statutory law to cover all situations meant that customs and practice developed over time had to be applied as well.

33. Her delegation had been troubled by the Guide's narrow and restrictive interpretation of the term "rule of law", and suggested either reformulating article 5, paragraph 1, to make that term unnecessary, as suggested by the Russian Federation, or replacing "rule of law" by "where law requires". Whatever terminology was used should be broad enough to allow the Model Law to be used in the interpretation of customs and practice as they were recognized and applied to the transactions at hand.

34. Mr. SANDOVAL LÓPEZ (Chile) agreed with those delegations which were in favour of strictly interpreting the term "rule of law" as meaning rules originating in legislatures or other law-making bodies. Any replacement of the term should follow that interpretation.

35. Mr. ALLEN (United Kingdom), supported by Mr. GOH (Singapore), said the Commission needed to decide on a neutral term that covered but did not exceed

case law, statutory rules, and customs and practice in so far as those formed part of the law. He suggested modifying the United States formulation of "where law requires" to read "where the law requires" as a way to include all three categories.

36. Mr. MASUD (Observer for Pakistan) suggested adding the words "or customs and practice recognized as rules of law" after "rule of law".

37. Mr. LLOYD (Australia) said some customs and practices were not rules of law, but were simply chosen by the parties; inclusion of such customs and practices would constitute an inappropriate modification of the meaning of chapter II of the Model Law. He therefore supported the United Kingdom formulation "where the law requires".

38. Mr. MAZZONI (Italy) said under Roman law, while "rule of law" could include rules which were non-parliamentary in origin, the term "the law" was more restrictive in scope than was perhaps intended in the current case by members of the Commission. If a majority of the Commission wished to adopt the term "the law", however, the Guide should make clear that the expression included case law and customs having the force of law.

39. Mr. ABASCAL (Mexico) agreed with the position of the Italian delegation. The formulation suggested by the United Kingdom raised the possibility that a broad interpretation of the term "the law" would be inconsistent with article 28, paragraphs 2 and 4, of the UNCITRAL Model Law on International Commercial Arbitration, where a clear distinction had been drawn between "the law" and the usages of the trade applicable to the transaction at hand.

40. Mr. MADRID (Spain) said he agreed with the Mexican delegation that changing "rule of law" to "the law" would not solve the problem of inconsistency between different model laws, since the latter term also had a narrower meaning in the UNCITRAL Arbitration Model Law than in the Model Law under discussion. Thus, it made no difference which term was used, as long as the Guide explained that the term referred to any generally recognized rule that overrode the will of the parties concerned.

41. Ms. BOSS (United States of America) said terminological inconsistencies, even among the products of a single body, were virtually inevitable. The phrase "rule of law" was more likely to be interpreted in a technical sense, whereas "the law"" lent itself to a wider variety of interpretations. She recognized the conflicts pointed out by the representative of Mexico, but they did not seem to represent an insurmountable difficulty. More troubling was Italy's observation that "the law" could be interpreted too narrowly under certain legal traditions. She suggested two alternatives: retaining "rule of law" and defining that term in article 2 of the text, or replacing it with the broader term "the law" and elucidating its meaning in the Guide.

42. Mr. SORIEUL (International Trade Law Branch) said he favoured the term "the law", which covered the whole system of applicable law, including legislation, case law and recognized practice. The Guide should explain that the term encompassed those three categories of rules. He saw no inconsistency with

article 28 of the UNCITRAL Arbitration Model Law, since the latter dealt with the choice among different types of applicable law.

43. Mr. CHOUKRI (Observer for Morocco) said he was satisfied with the term "rule of law", since any law consisted of various types of rules.

44. Mr. MADRID (Spain) said that, with respect to the second alternative proposed by the United States delegation, users of the Model Law would not necessarily consult the Guide for clarification of the term "the law". It would be preferable to retain "rule of law", which clearly had a more specific meaning, and to give a brief definition of the term in article 2.

45. Mr. MAZZONI (Italy) said either proposal was acceptable, but he also preferred the first alternative.

46. Mr. TELL (France) said he supported the secretariat's proposal because the term "law" was broad enough to encompass all of the areas to be covered by the Model Law. It was inadvisable to define the term in the Model Law itself because that would only lead to more disagreement and difficulty, in view of the variety of legal systems in the States members of the Commission.

47. Mr. ALLEN (United Kingdom) said the two possibilities mentioned by the United States representative were not mutually exclusive and a compromise solution could be to use the term "the law" and define it in article 2.

48. Ms. BOSS (United States of America) said she agreed with the French delegation that the Commission was unlikely to find a definition that would be acceptable to all of its members; for that reason, any explanation of the term used should appear in the Guide and not in the Model Law itself. She would prefer to use the term "the law" and to define it in the Guide.

49. The CHAIRMAN said there appeared to be a consensus in favour of the proposal just made by the United States representative.

The meeting rose at 1 p.m.

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-ninth session

SUMMARY RECORD OF THE 598th MEETING

Held at Headquarters, New York,
on Thursday, 6 June 1996, at 3 p.m.

Chairman: Mrs. PIAGGI de VANOSSI (Argentina)

CONTENTS

ELECTION OF OFFICERS (continued)

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued)

This record is subject to correction.

Corrections should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent within one week of the date of this document to the Chief, Official Records Editing Section, Office of Conference and Support Services, room DC2-794, 2 United Nations Plaza.

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96-80766 (E)

The meeting was called to order at 3.30 p.m.

ELECTION OF OFFICERS (continued)

1. Ms. EKEMEZIE (Nigeria) nominated Mr. S. Thuita Mwangi (Kenya) for the office of Vice-Chairman.

2. Mr. S. Thuita Mwangi (Kenya) was elected Vice-Chairman by acclamation.

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued) (A/50/17; A/CN.9/421)

Draft article "x" (continued)

3. Mr. CHANDLER (United States of America) introduced the revised version of paragraph 3, which read: "Where one or more data messages have been used to effect any of the actions in paragraph 1 (f) or (g) of this article, and a paper document is subsequently to be used to effect any such action, no such paper document is effective for the purpose of law mentioned in paragraph 4 of this article, unless, as between the person subject to the obligation to deliver and the holder of a right acquired by means of a data message, the use of data messages for this purpose has ceased to be valid, and unless the paper document contains a statement that data messages may no longer validly be used for such purposes in place of the paper document. Any such replacement of a data message by a paper document shall not have the effect of modifying any existing right or obligation."

4. He introduced the revised version of article 4, which read: "Under a contract of carriage, if a right is to be granted to, or an obligation is to be acquired by, one person and no other person, and if the law requires that, in order to effect this, the right or obligation must be conveyed to that person by the transfer, or use of, a paper document, the requirement of that law is satisfied if the right or obligation is conveyed by any means which includes the use of one or more data messages, provided a method is used to give reliable assurance that the right or obligation becomes vested in the intended person and in no other person."

5. Mr. HOWLAND (United Kingdom) commended the United States delegation for its work on paragraph 3 of article "x" and for achieving a considerable degree of harmony. While the draft of paragraph 3 was not exceedingly long, he suggested, for purposes of clarity, that the text should be broken up by inserting a colon after the word "unless", a small (a) before the words "as between" and a small (b) before the words "the paper document contains". The last sentence should appear as a new paragraph.

6. Mr. ALLEN (United Kingdom) favoured retaining the expression "rule of law", as opposed to "law", in paragraph 3, since the sentence referred to paragraph 4, which used the term "rule of law".

7. Mr. TELL (France) said that it would be extremely difficult for members of the Commission to consider the revised versions of paragraphs 3 and 4 without a copy of the text in English and the other official languages.

8. Mr. RENGER (Germany), supporting the representative of France, said that his delegation could not consider or endorse the revised versions of paragraphs 3 or 4 if it did not have before it the text in printed form, which under normal procedures, should have been distributed as a working paper.

9. Mr. SORIEUL (International Trade Law Branch), confirming the views of the representatives of France and Germany, said that it was not possible for the Commission to consider the paragraphs in question without a copy of the text in all official languages. Accordingly, he proposed that the Commission should wait for the other language translations to be issued before continuing consideration of paragraphs 3 and 4 of article "x".

10. Mr. CHANDLER (United States of America) said that he understood the concerns of the Commission regarding the need for a printed text of paragraph 3. However, he proposed that the Commission should discuss paragraph 4, which had undergone only slight changes.

11. Mr. MADRID (Spain) requested that copies of the text should be made available to all delegations at least in the English version.

12. Mr. DONG Yi (China) agreed with previous speakers that the amendments to paragraphs 3 and 4 were considerable and that all delegations should be in possession of a printed text before considering those amendments, if not in translation, then at least in English.

13. Mr. HOWLAND (United Kingdom) said paragraph 4 had only been slightly revised to incorporate amendments that had been discussed and agreed upon at an earlier meeting.

14. The CHAIRMAN suggested that if all delegations agreed, the Commission should consider paragraph 4 since the changes to it were minor and the original text of that paragraph appeared in the annex to document A/CN.9/421.

15. Mr. LLOYD (Australia) asked why the words "under a contract of carriage" had been added to the beginning of paragraph 4.

16. Mr. CHANDLER (United States of America) said that the words "under a contract of carriage" had been added at the beginning of paragraph 4 in response to the concern expressed by a number of delegations, including China, that the paragraph might, if taken out of context, be interpreted too broadly. However, the additional phrase could be considered redundant in the light of paragraph 1, and his delegation would not object if the Commission preferred to delete it.

17. Mr. LLOYD (Australia) said that his delegation had no objection to the proposed amendments. However, it would be necessary to use the words "the requirement of that law" rather than "the requirement of that rule" in the third line of the paragraph.

18. Mr. MAZZONI (Italy) said that, according to Italian law, under a bill of lading, rights could be transferred either by endorsement and physical delivery of the paper or "by consent" which did not involve delivery of the document. Consequently, there might be some ambiguity as to which of those methods was to be replaced by the use of a data message.

19. He noted also that there was some circular logic in the proposed wording, which seemed to say that the right became vested when conveyance was effected, and vice versa.

20. Mr. ABASCAL (Mexico), supported by Mr. MADRID (Spain), said that the words which had been added at the beginning of the paragraph should be deleted; the paragraph might be needed for transactions other than contracts of carriage.

21. Mr. CHANDLER (United States of America), replying to the representative of Italy, said that in international commerce, only the physical delivery of the paper document was acceptable. One of the major advantages of using electronic transfer was that, being instantaneous, it avoided delays caused by the time required for that delivery. A system of transfer "by consent" was a bad practice; it could not and should not continue once an EDI system was introduced.

22. Mr. HOWLAND (United Kingdom) said that paragraph 4 was intended solely to remove a legal impediment to the use of electronic means instead of paper documents, where such an impediment existed.

The meeting was suspended at 4.35 p.m. and resumed at 5.20 p.m.

23. Mr. MAZZONI (Italy) suggested the following wording for paragraph 4: "Provided that the method used to effect such conveyance is reliable enough as to designate as sole addressee (beneficiary) of such data message the intended person only and no other person." He suggested that the text should be taken up by the drafting group.

24. Mr. HOWLAND (United Kingdom) proposed the following wording: "Provided a method is used to give a reliable assurance that no other data message has been or may be used by the transferor for the purpose of transferring such right or obligation to more than one person at any given time."

25. Mr. SORIEUL (International Trade Law Branch) said that the drafting group was a technical group and could not be asked to settle matters of substance. Time was running out; priority must be given to adopting the Model Law. Interested delegations would have to meet in an ad hoc working group, and if the resulting text was fairly close to the current article 4, it could be taken up at once. Otherwise, the proposals would have to be typed out and translated before they could be considered by the Commission.

26. Mr. LLOYD (Australia) said that the United Kingdom proposal did not solve the problem posed by the fact that methods could not give assurances - only people could. The Italian proposal avoided the problem, but was a little vague. He would prefer to use wording such as "a reliable method is used to ensure".

27. Mr. CHANDLER (United States of America) said that the Commission seemed to be looking for a degree of certainty that could never be achieved. The deeper it went into the details of transference, the more it would intrude upon system rules. Both the Italian proposal and the United Kingdom proposal went too far. It might be better to retain the existing text, with minor drafting changes. The more the Commission tried to add to the provision, the more unwieldy it would become.

28. Mr. MADRID (Spain) said that the Model Law already used the term "method", for example in article 6, paragraph 1 (b), which also referred to the concept of reliability. The question of reliability had been taken up in the Working Group and by the Commission itself, and the consensus seemed to be that the Commission should not lay down requirements for data messages and electronic communications that were more stringent than those applied to paper-based communications, from which fraud and discrepancies could not be completely eliminated. While the Commission had to establish a method which inspired confidence, it could not expect to prevent fraud in all cases.

29. He agreed that consensus seemed to have been reached on the paragraph and that only minor drafting changes were needed; there was therefore no need to raise matters of substance that went beyond the consensus that had been achieved.

30. Mr. FALVEY (Observer for the International Association of Ports and Harbors) said that his organization supported the United States proposal but wished to suggest that in addition the Guide to Enactment should refer to the guarantee of singularity as the purpose of paragraph 4. In that way, the Commission would close the circle.

31. Mr. SANDOVAL LÓPEZ (Chile) and Mr. MASUD (Observer for Pakistan) said that they supported the United States proposal.

32. Mr. ZHANG Yuqing (China) said that the existing draft should be retained. The submission of new proposals only prolonged the debate, and his delegation did not feel that any of the new proposals improved on the existing text.

33. His delegation had some difficulties with the phrase "by any means which includes the use of one or more data message" and would prefer to delete it. If a country stipulated that a paper document had to be used to convey a right or obligation, there was only one means; if the Commission was trying to expand the scope of the means of conveying rights and obligations to include data messages, then there would be two means, so that the rule would be satisfied if the right or obligation was conveyed by one or more data messages. The existing wording gave the impression that the Commission was trying to expand the application of domestic law.

34. Mr. ABASCAL (Mexico) said that it could be difficult to establish very strict requirements in paragraph 4. The Commission seemed to be seeking a degree of assurance that did not exist even in paper documents. The technology for providing such a level of assurance did not exist, so that if the Commission established such a requirement, it would effectively be prohibiting the transfer of rights through data messages. He suggested that instead of the words

"reliable assurance", the Commission should use terms regularly used in international trade contracts, such as "a reasonable method in the circumstances". That would accommodate the rules of the Comité maritime international, since adopting those rules would be reasonable in the circumstances.

35. The CHAIRMAN asked whether the Commission could agree to retain the original text, or whether it preferred the United States proposal.

36. Ms. GUREYEVA (Russian Federation) said that her delegation partially supported the United States proposal, but also supported the Chinese proposal.

37. Mr. MAZZONI (Italy) said that there was no divergence of opinion about the purpose of paragraph 4. If the majority of delegations favoured retaining the last phrase of the paragraph, his delegation would have to place its opposition on record.

38. The CHAIRMAN said that the Commission would have to continue its consideration of paragraph 4 at the next meeting.

The meeting rose at 6.05 p.m.

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-ninth session

SUMMARY RECORD OF THE 599th MEETING

Held at Headquarters, New York,
on Friday, 7 June 1996, at 10 a.m.

Chairman: Mrs. PIAGGI de VANOSSI (Argentina)

CONTENTS

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued)

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96-80773 (E)

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The meeting was called to order at 10.25 a.m.

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued) (A/50/17; A/CN.9/421 and 426)

Article 6

1. Ms. BOSS (United States of America) proposed the following amendment to cover situations where one person prepared a document and another person signed it: in the first sentence of paragraph 1, "of a person" should be inserted after "signature" and in subparagraph (a) "the originator" should be replaced by "that person". The words "of the data message" would have to be deleted from subparagraph (a).

2. Mr. MASUD (Observer for Pakistan) supported the United States proposal and suggested that, for the sake of consistency with other articles, the phrase "the requirement of" should be inserted before "that rule" in the first sentence.

3. Mr. SORIEUL (International Trade Law Branch) agreed that certain changes would have to be made for the sake of consistency. For example, "a rule of law" in the first sentence of paragraph 1 would have to be changed to "the law". In line with the United States proposal, "between the originator" in subparagraph (b) should be amended to read "between the person whose signature is required ...".

4. Mr. CHOUKRI (Observer for Morocco) maintained that it was not necessary to add "of a person" in the first sentence of paragraph 1, as a signature was always provided by a physical or legal person. However, in subparagraph (a), "the originator" should be changed to "the person who will sign" in order to indicate that that person approved of the message.

5. Article 6, as amended, was adopted.

Article 10

6. Mr. SORIEUL (International Trade Law Branch), referring to paragraph 274 of the Commission's report (A/50/17), said the Commission must decide on the placement of article 10 now that it contained two paragraphs, one on the provisions of chapter III and one on the mandatory provisions of chapter II. As it spanned two chapters, it would be logical to include it under chapter 1 on general provisions.

7. Ms. BOSS (United States of America) said the secretariat's proposal made a great deal of sense. Since there were very few provisions referring to chapter II in the more specific chapter III, the most appropriate place for the article was under the general provisions of chapter I.

8. Mr. MADRID (Spain) and Mr. ABASCAL (Mexico) agreed with the remarks made by the representative of the secretariat and the United States representative.

9. Mr. PHUA (Singapore) cautioned that the words "this chapter" in article 10, paragraph 1, would have to be changed if the article was moved to another chapter.

10. Mr. ZHANG Yuqing (China) said the problem raised by the representative of Singapore was difficult to solve. If "this chapter" were amended to read "this Model Law", it could mean that all 14 articles of the Model Law could be changed by agreement. If the article was moved to chapter I with an indication that chapter III could be varied by agreement, then there was no justification for moving it.

11. Mr. SORIEUL (International Trade Law Branch) explained that when there had been only one paragraph in the article, referring to chapter III, it had seemed logical to say "this chapter". However, it might make more sense to place the two-paragraph article referring to two different chapters in the general provisions portion of the Model Law. As indicated by the representative of Singapore, a drafting change would be necessary.

12. Mr. MADRID (Spain) suggested that the words "this chapter" should be replaced either by "Part I" or by reference to specific article numbers. That would avoid confusion if Part II of the Model Law were to be divided into chapters at a future date.

Article "x"

13. Mr. CHANDLER (United States of America) proposed the following amended text of article "x", paragraph 4: "If a right is to be granted to, or an obligation is to be acquired by, one person and no other person, and if the law requires that, in order to effect this, the right or obligation must be conveyed to that person by the transfer, or use of, a paper document, that requirement is satisfied if the right or obligation is conveyed by the use of one or more data messages, provided a method is used to give reasonable assurance that the use of such data messages is unique." The concept of uniqueness could be explained in the draft Guide to Enactment of the Model Law (A/CN.9/426).

14. Mr. LLOYD (Australia) said it would be more logical for the final element of the United States proposal to be amended to read "reasonable assurance that such data messages are unique".

15. Mr. MAZZONI (Italy) said replacing the words "and if a rule of law requires that" by "and if the law requires that" raised the problem of which law was being referred to, since any one of a number of laws might come to mind, such as legislation relating to title and ownership or laws on carriage. A specific reference would thus be preferable. It would also be better to include in the paragraph the concept of agreement between the sender and recipient of a data message on the use of that method rather than paper, since the sender should not be given the power to impose the use of data messages for legal purposes. Lastly, the reference to "unique" at the end of the United States proposal was welcome, and should be reflected in the Guide.

16. Mr. CHANDLER (United States of America) said his delegation could accept the amendment proposed by the representative of Australia. The first Italian

proposal, however, might raise the problem of conflicts between laws, given the great variance between legal systems, some of which had very detailed provisions in that area and some of which had virtually none. Equally, the view that parties needed to agree on the use of data messages would interfere with current practice with regard, for example, to letters of credit and bills of lading. Nevertheless, it should be possible to use a paper document since parties in some States were simply not equipped for electronic data interchange, while parties that were so equipped might still find that the use of paper was necessary, if, for example, there were problems with the system. Insistence on agreement between the parties would, however, simply create impediments and impose conditions that did not currently exist.

17. Mr. MAZZONI (Italy) said using the phrase "the law" without further elaboration was not a solution if it was not clear what was meant. Regarding agreement between the parties, the proposed rules would allow a sender to use either electronic means or paper, which gave that party too much power.

18. Mr. ABASCAL (Mexico) said his delegation supported the United States proposal, as amended by the representative of Australia. He agreed with the United States representative that the imposition of a requirement of agreement between parties before use could be made if electronic means of transferring rights would frustrate the objectives of article "x", since the use of electronic means did not, in reality, constitute an imposition by the originator, but, rather, implementation of the way in which rights were transferred through an electronic system.

19. Ms. BOSS (United States of America) said that where sender and recipient were set up to transfer rights through electronic messaging it could be argued that there was already implicit agreement to send and receive messages. The question of whether a transferee could be required to take data messages if not equipped to do so or if there was a need for paper was a separate issue, relating to the right of the transferee to demand replacement paper. In fact under paragraph 3 transferees would have a unilateral ability to terminate data messages and substitute paper for such messages.

20. Mr. MAZZONI (Italy) said if the rule applied to a unified system embracing both parties then clearly the question of consent did not arise, since there was consent by virtue of adhering to the system. But the rule was not worded in such a way as to make it apparent that it applied to such systems. It could, in fact, apply to someone who had an electronic capability but did not wish rights to be transferred by electronic means, and the rule would also allow a switch from paper to electronic messages even if the recipient did not want that, an issue which was not addressed under paragraph 3, which, rather, dealt with the converse situation. In effect the proposal would embody an involuntary rule concerning the switch from paper to electronic means, even though that was not the purpose of the rule. Unless the rule were amended to indicate that it referred to a closed system, within which the question of consent did not arise, the issue still needed to be addressed.

21. Mr. LLOYD (Australia) said the paragraph did not confer upon the transferor a right to transfer by electronic means, but merely a legal equivalence between

data messages and paper. In actuality a recipient could simply say that paper was required and a transferor would then need to make appropriate arrangements.

The meeting was suspended at 11.30 a.m. and resumed at noon.

22. Mr. MADRID (Spain) said he supported the changes to article "x", paragraph 4, proposed by the United States and Australia. That paragraph did not impose any obligations; like the rest of the Model Law, it was intended only to facilitate the use of electronic means of communication.

23. Mr. CHANDLER (United States of America) suggested that the Guide should clarify that the paragraph was not intended to make the use of electronic data interchange (EDI) mandatory.

24. Ms. REMSU (Observer for Canada) said she agreed with the delegations of the United States, Australia and Spain that there was no need to refer to the agreement of the parties, since the transfer of rights to goods was subject to agreement whether or not it involved EDI.

25. Paragraph 4, as amended, was adopted.

Draft Guide to Enactment of the UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication (A/CN.9/426)

26. Mr.SORIEUL (International Trade Law Branch) introduced document A/CN.9/426), the annex to which contained the draft Guide to Enactment of the UNCITRAL Model Law. That text reflected the suggestions and decisions of the Working Group at its twenty-ninth session, as well as those of the Commission at its twenty-eighth session. In addition, the points raised at the Commission's current session would be incorporated into the final version of the Guide. He suggested that the Commission should discuss only the substantive points that should be reflected in the Guide; any terminological or other drafting changes should be submitted to the secretariat in writing. Although the Guide would not be finalized by the end of the current session, the Commission could adopt it because any changes in its content would be reflected in the report, which would be available by the end of the session.

27. Ms. BOSS (United States of America) said the Guide would have to reflect the Commission's earlier decision to change the words "electronic data interchange" in the Model Law's title to "electronic commerce". Accordingly, terms such as "EDI users" and "EDI practice" would also have to be changed. She was concerned about the use of the term "minimum requirements" in several places in the Guide because it seemed to invite legislatures to adopt further requirements, which was not the Commission's intent. The descriptions of "basic standards" in the sections on the concepts of "writing", "signature" and "original" were clearer, and the same technique should be used in all references to minimum requirements.

28. Mr. MADRID (Spain) asked whether the secretariat could provide delegations with a draft Guide showing the paragraphs in the order in which they appeared in the amended version of the Model Law. The Commission could then adopt the

substance of the Guide, though not the actual wording, when it adopted its report. The change in the name of the Model Law, noted by the United States, was also a change of perspective, which must be reflected in the Guide. The same was true of the decision to change "a rule of law" to "the law", which would require more extensive revision than a simple substitution of one term for another.

29. Mr. SORIEUL (International Trade Law Branch) said the Commission had two alternatives: to adopt the Guide without seeing the final document, in which case the Guide would be published along with the Model Law within a few months, or to wait until the next session to adopt the Guide. The disadvantage of the second alternative was that it could lessen the usefulness of publishing the Model Law in the current year, since the Commission had agreed that the Model Law must be read in conjunction with the Guide in order to be interpreted correctly.

30. Ms. BOSS (United States of America), supported by Mr. CHOUKRI (Observer for Morocco), said it would be dangerous to delay the finalization of the Guide until 1997 while publishing the finalized Model Law in 1996. Her delegation had full confidence in the secretariat's ability to incorporate comments from delegations in a final product, and called upon the Commission to approve the Guide, on the understanding that it would be revised to accommodate the changes made in the Model Law during the Commission's current session, the Commission's discussion of those changes, the comments made during the Commission's discussion of the Model Law and the written comments on the draft Guide submitted to the secretariat by delegations.

31. Mr. ABASCAL (Mexico), supported by Mr. SANDOVAL LÓPEZ (Chile), agreed that the adoption of the Guide should not be delayed. As had been done in the case of the draft Notes on Organizing Arbitral Proceedings, the secretariat should be given a mandate to implement the comments made during the Commission's debate on the Guide and provide a finalized document with the prior approval of the Commission.

32. Mr. LLOYD (Australia) said paragraph 78 of the Guide should be included under article 5, where the phrase "a rule of law" first occurred, and should be worded so as to refer to each of the subsequent occurrences of that phrase. Moreover, the third sentence of paragraph 84 appeared to contradict the sentence immediately preceding it. He also suggested the possibility of issuing a draft Guide pending publication of the finalized Guide.

33. Mr. STURLESE (France) said publishing the Guide and the Model Law separately would be regrettable; the Model Law needed to be read in the context of the clarifications contained in the Guide. A flexible approach, as suggested by the secretariat, would be to adopt the existing draft of the Guide and then mandate the secretariat to incorporate any substantive changes in it.

34. Mr. FARIDI ARAGHI (Islamic Republic of Iran) requested clarification as to whether the Guide would be published in two parts, in parallel with the two parts of the Model Law.

35. Mr. SORIEUL (International Trade Law Branch) said comments on the substance of article "x" would have to be integrated in the Guide once that article had been adopted; the Guide should also reflect the discussion on the significance of the Model Law's division into two parts. He suggested that a date should be added to the heading of the Guide, so that new material could be added in the future without requiring a change of title.

36. Mr. GOH (Singapore), supported by Mr. NIYOM-RERKS (Thailand), expressed doubts regarding the appropriateness of adopting the Guide without having considered the final version. The Model Law would be adopted at the Commission's current session, but the Guide could be adopted at the following session if necessary.

37. Mr. MASUD (Observer for Pakistan) said he joined previous speakers in expressing confidence in the secretariat's ability to prepare a final version of the Guide in the light of the current discussions. Moreover, in order to clarify the voluntary nature of the use of electronic commerce envisaged under the Model Law, he suggested that in paragraph 55 of the Guide the words "without in any way imposing it" should be added before the colon at the end of item (1) in the list of basic principles underlying the Model Law.

38. Mr. ZHANG Yuqing (China) said he completely agreed with the representative of Singapore in that there appeared to be no need to publish the Model Law and the Guide at the same time. The Model Law, if adopted at the current session, could be published first, but the many changes made in the Model Law during the current session would have an impact on the Guide. There appeared to be no precedent for allowing the secretariat essentially to rewrite the entire Guide on the Commission's behalf and then publish it without having the Commission examine the final version and amend it if necessary.

39. Mr. BURMAN (United States of America), supported by Mr. ABASCAL (Mexico) and Ms. REMSU (Observer for Canada), said the commentaries contained in the Guide reflected the provisions agreed to in the Commission's debates. There were precedents for allowing the secretariat to compile a finalized version of such commentaries with the Commission's prior approval, most recently in the case of the draft Notes on Organizing Arbitral Proceedings. Timely publication of the Guide and Model Law was important, in view of the desire of many countries to refer to the Model Law in formulating their own national legislation in the area of electronic data interchange.

The meeting rose at 1.05 p.m.